

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-7195

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FLOYD G. QUINERLY,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Senior District Judge. (CR-93-32-N, CA-96-359)

Submitted: January 30, 1998

Decided: February 24, 1998

Before ERVIN and MICHAEL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Floyd G. Quinerly, Appellant Pro Se. Harvey Lee Bryant, III, Assistant United States Attorney, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Floyd G. Quinerly appeals from the district court's order denying his motion under 28 U.S.C.A. § 2255 (West 1995 & Supp. 1997). We deny a certificate of appealability and dismiss.

Quinerly raised two claims in his § 2255 motion: (1) that he did not "use" a firearm as defined by the Supreme Court in Bailey v. United States, ___ U.S. ___, 64 U.S.L.W. 4039 (U.S. Dec. 6, 1995) (Nos. 94-7448, 94-7492); and (2) that his possession of the firearm did not occur "during and in relation to . . . a drug trafficking crime." Because the second of these claims is a nonconstitutional error that could have been raised on direct appeal, Quinerly may not now attack it via a § 2255 motion. See Stone v. Powell, 428 U.S. 465, 477 n.10 (1976). We therefore conclude that the claim is waived and dismiss the appeal as to that claim.

As to Quinerly's Bailey claim, we agree with the district court that the evidence was sufficient to sustain the jury's verdict because it established that Quinerly actually "carried" the firearm in question. See United States v. Hudgins, 120 F.3d 483, 487-88 (4th Cir. 1997); United States v. Mitchell, 104 F.3d 649, 654 (4th Cir. 1997). Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED